

Federal Court



Cour fédérale

Date: 20201001

**Dockets: T-1139-19
T-1227-19**

Citation: 2020 FC 945

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 1, 2020

PRESENT: The Associate Chief Justice Gagné

Docket: T-1139-19

BETWEEN:

**STÉPHANE LANDRY, DENIS LANDRY, HUGO LANDRY,
MAXIME LANDRY, SHANONNE LANDRY,
NORMAND CORRIVEAU, NORMAND BERNARD CORRIVEAU,
NICOLAS ALEXIS LELAIDIER and RÉAL GROLEAU**

Applicants

and

**THE COUNCIL OF THE ABÉNAKIS OF WÔLINAK,
MICHEL R. BERNARD, RENÉ MILETTE and
LUCIEN MILETTE**

Respondents

Docket: T-1227-19

AND BETWEEN:

**THE COUNCIL OF THE ABÉNAKIS OF
WÔLINAK**

Applicant

and

**THE REGISTRAR OF THE ABÉNAKIS OF
WÔLINAK FIRST NATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] Before me are two new applications for judicial review which oppose the main factions of the Abénakis of Wôlinak First Nation [the Band]: the extended Bernard family and the extended Landry family.

[2] In the first application (T-1139-19), a number of members of the Landry family are essentially asking the Court to declare that associate members of the Band have a right to vote in elections for the positions of chief and councillors. According to the Landrys, the Membership Code provision denying associate members the right to vote is illegal and discriminatory. In any event, they assert that a well-established custom dating back to 1987, namely the fact that they have in fact voted since the adoption of the Membership Code, takes precedence over that provision. They are further challenging Resolution RCB-2019-2020-010 by which the Band Council suspended elections that were scheduled to have been held on August 11, 2019, pending receipt from the Registrar of an updated list of voting members, excluding associate members.

[3] In the second application (T-1227-19), the Band Council is asking the Court to order the Band Registrar, Lynda Landry, to provide the Electoral Officer with an up-to-date, certified list

of Band members, that is to say a list that contains information that would enable her to identify associate members so as to exclude them from the electoral process.

II. Facts

[4] As I indicated in *Landry v Council of the Abénakis of Wôlinak*, 2018 FC 1211 [*Wôlinak* 2018], these applications for judicial review are part of a lengthy and unfortunate saga involving the parties that has dragged on for years and the ultimate goal of which is to obtain control of the Band Council. However, the history of the proceedings in this matter is not relevant to the issues raised in the current applications.

[5] The only relevant facts are those that would shed light on the adoption of the Membership Code of the Abénakis of Wôlinak, on the role of the Band Registrar and the maintenance of the Membership Register, as well as the past exercise of the right to vote by associate members of the Band.

[6] The Abénakis of Wôlinak are an Indigenous band within the meaning of subsection 2(1) of the *Indian Act*, RSC 1985, c I-5 [the Act].

[7] In 1985, Parliament amended the Act in order to enable every Indigenous band to establish its own membership rules. Most First Nations have since adopted their own membership codes, as the Abénakis of Wôlinak did in 1987.

[8] The preamble of that Code clearly expresses the will of its authors to promote the bringing together and reconciliation of all Abénakis and in that sense, it aims to be highly inclusive. The Code provides for three categories of members: ordinary members, associate members, and honorary members.

[9] Ordinary members are Abénakis or descendants of Abénakis who have lived on the reserve, who subscribe to each of the Code's provisions, and who are not members of another band.

[10] Associate members are non-Indigenous persons married to ordinary members, non-Indigenous children adopted by ordinary members, or children of associate members.

[11] Lastly, honorary members are those who subscribe to each of the Code's provisions and who, [TRANSLATION] "during the pleasure of the band and pursuant to a decision by the Band Council, have rendered exceptional services to the band or to its members".

[12] All band members, regardless of category, enjoy the rights that are conferred upon them by the Membership Code and the Act, subject to the requirements and limitations set out in the Code; such as, for example, contributing to the band's cultural, social and economic development, and having the right to enter and circulate freely on the reserve.

[13] However, the Code does impose a number of restrictions on associate members: for example, they cannot run for office, including that of chief (articles 15-16); they are not entitled

to legal possession of a lot, nor of course, to receive a grant for the improvement of a lot or for the construction of a building (articles 19-20); they may not attend general and special assemblies relating to elections for the office of councillor or chief, and they may not participate in the electoral process (article 26); however, they may attend and speak at any other general or special assembly (article 27).

[14] Honorary members, however, have only those rights granted to them by the Band Council (article 28) until they are withdrawn (article 29).

[15] Title V of the Membership Code concerns the Band Register, and its Chapter I is entitled [TRANSLATION] “The Register and its Registrar”.

[16] It provides that the Band must maintain a duplicate band register of Band members, at least one copy of which must be kept at the council office for consultation. Given the above distinctions between the various categories of membership, the Register must be organized by chapter:

[TRANSLATION]

Chapter 1: Ordinary members registered on the list of members at the time of the entry into force of the Membership Code (article 8-1)

Chapter 2: Other ordinary members (article 8-2)

Chapter 3: Associate members as a non-Indigenous child legally adopted by an ordinary member (article 9 c))

Chapter 4: Associate members as spouses of ordinary members (articles 9 a) and b))

Chapter 5: Honorary members (article 10)

Chapter 6: the constitution of the official list of members to be kept by the Registrar in accordance with the requirements of article 37 f) of the Membership Code. The Registrar must record all the members of the First Nation in alphabetical order and clearly indicate to which categories of members they belong, with reference to the various chapters of the Register.

[17] It also provides that a person to be known as the “Registrar” shall be elected at a special assembly called for that purpose and shall hold office during pleasure. Although the Code provides that the assembly may, if necessary, dictate the compensation that can be awarded to the Registrar for his or her services, respondent Lynda Landry informed the Court that since her election to that position, she has not received any compensation. The Registrar is not required to [TRANSLATION] “search for the names of those entitled to be entered on the Register” (article 43), but it must keep the Register up-to-date and collect [TRANSLATION] “from any person wishing to be entered the documents required under [the] Code” (article 45). The Registrar must remove or add to the list of members the name of any person who becomes or ceases to be a member, and make the necessary amendment to the Register (article 49). The Registrar must keep a record of every person who claims to be a member for five years (article 50).

[18] Finally, the Membership Code provides that it may only be amended by a Band Council resolution passed by a majority vote of all Band members entitled to vote at a special general assembly called for that purpose (article 76).

[19] A number of court decisions have invalidated some aspects of the Membership Code (see, for example, *Corbiere v Canada (Minister of Indian Affairs and Northern Development)*, [1999] 2 SCR 203, 173 DLR (4th) 1, where the Supreme Court ruled that the distinction made

between on-reserve and off-reserve members was discriminatory). However, it is not necessary to enumerate them since none of them have a direct impact on the case at bar.

[20] In addition, the Electoral Code adopted by the Band in 2008 (i.e., following the *Corbiere* decision) defines two terms that are relevant to the present case:

[TRANSLATION]

Voter

A person who

- (a) is listed, or entitled to be listed, on the Première Nation des Abénakis de Wôlinak Band List;
- (b) is eighteen (18) years old on voting day, and
- (c) has not lost the right to vote in the elections of the First Nation

Voters List

The list of electors of the Première Nation des Abénakis de Wôlinak maintained by the Band Registrar

[21] The Electoral Code provides for a method of revising the electoral list, but does not otherwise provide for who is entitled to vote in elections.

[22] However, as I pointed out in *Wôlinak* 2018, the Register and the list of Band members were never drawn up by chapter or kept up-to-date in accordance with the Membership Code.

[23] As the Landrys admit in paragraph 36 of their memorandum of fact and law, the Band had not held an election to fill the position of Registrar for at least 20 years. According to the

evidence in the record, the maintenance of the membership list and the Register was the responsibility of the person appointed from time to time to the combined positions of Programs and Services Coordinator, Education Officer, Income Security Officer and Registration Officer. However, the function of Registration Officer was distinct from that of Registrar. The former was responsible for certain services provided to Band members with Indian status who were registered in the Indian Register maintained by the Department of Indigenous and Northern Affairs (including the issuance of Certificates of Indian Status), as well as for coordination with the Department. The latter was an elected official who performed the duties set out in the Membership Code and was responsible for maintaining the membership list and the Register in accordance with the provisions of the Code.

[24] One of the direct consequences of the numerous disputes between the parties is the fact that the terms of office of all Band Council members have now expired.

[25] It is in this context that on March 6, 2019, the Minister responsible for Indigenous Affairs wrote to the Band Council to remind it of the need to hold an election without delay.

[26] On April 10, 2019, the Council adopted Resolution RCB-2019-2020-001 and called the members to a special general assembly to be held on April 27, 2019, in order to provide for the election of the Registrar in accordance with article 40 of the Membership Code. By Resolution RCB-2019-2020-002, the Council also set an election date to fill the positions of four councillors at July 7, 2019.

[27] On April 27, 2019, respondent Lynda Landry was elected Band Registrar.

[28] There followed a series of meetings and exchanges (and, it must be said, obstruction on both sides) between the Council and the Registrar, who could not agree on the creation of the Register of members, nor on the content of the list of members. At the heart of this disagreement was the question of whether the Register and the list should be constructed in such a way that the Electoral Officer is able to recognize associate members in order to exclude them from the electoral process.

[29] As a result of this disagreement, the Council had to postpone the election until August 11, 2019 (see Resolution RCB-2019-2020-006), ultimately suspending it until the Court has ruled on the matter (see Resolution RCB-2019-2020-010).

III. Issues

[30] In file T-1139-19, the Landrys raise a number of issues regarding the suspension of the election scheduled for August 11, 2019, and the legal interest in challenging the list of members prepared by the Registrar. Since they are only peripheral, even academic, these issues will be dealt with on a preliminary basis. The only determinative issue at the heart of these applications for judicial review is whether associate members are entitled to vote in elections to fill Band Council positions. It is divided into two sub-issues:

- A. *Is article 26 of the Membership Code, which provides that associate members do not have the right to vote, discriminatory and illegal?*
- B. *Is the right of associate members to participate in the Band's electoral process an established custom that takes precedence over the Membership Code?*

IV. Analysis

A. *Preliminary issues*

(1) Validity of the resolution

[31] In docket T-1139-19, the Landrys argue that RCB-2019-2020-10 is invalid because it was not adopted in accordance with the provisions of subsection 2(3) of the Act, which provides that a Band Council exercises its powers by the consent of a majority of the councillors present at a duly convened council meeting.

[32] Since the resolution is dated July 7, 2019, and was presented at a meeting called on the 8th and held on the 9th, the Council is alleged to have failed to legally exercise its power to suspend the election. The evidence in this regard comes from dissenting councillor Christian Trottier, who described the process followed as follows:

[TRANSLATION]

On Monday, July 8, 2019, Chief Michel R. Bernard orally summoned me to a Band Council meeting to be held the following day, Tuesday, July 9, 2019.

I attended the meeting the next day.

Present at this meeting were Chief Michel Bernard, Councillors René and Lucien Milette, General Manager Dave Bernard and myself.

Dave Bernard read resolution RCB-2019-2020-010

Then Chief Michel R. Bernard, René and Lucien Milette signed the said resolution.

I refused to sign the resolution.

[33] While this evidence does not indicate any debate or discussion regarding the content of the resolution, it does confirm that the resolution was passed by a majority of the councillors present at a duly convened meeting of Council.

[34] In *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536, this Court confirmed that a resolution may validly be drafted or formulated before a meeting is held, provided that all members of the council have an opportunity to approve or disapprove it:

[78] . . . A council decision cannot be validly made where not all the councillors were given notice of the meeting. However, such a decision may be subsequently ratified at a council meeting where notice is given, opportunity to participate is provided to all members of council, and the matter is not already finally decided.

[35] I am therefore of the opinion that Resolution RCB-2019-2020-10 was duly adopted by the Band Council.

[36] The Landrys had, moreover, raised a similar argument in *Wôlinak* 2018 (at paras 40 to 45), which I rejected for the same reasons.

[37] In any event, the question is now moot since the election scheduled for August 11, 2019, did not take place, and no decision of the Court is likely to remedy this fact and its consequences.

(2) Legal interest in challenging the membership list

[38] The Landrys also argue that the Council has no legal interest in challenging the Band list prepared by Registrar Lynda Landry. They rely essentially on articles 63 et seq. of the Membership Code, which provide as follows:

[TRANSLATION]

Article 63 - In the event that a member or a person claiming to be a member wishes to contest his or her registration or non-registration on the Band Register or that of his or her minor children, a written request to that effect must be submitted to the Registrar setting out the reasons which, in his or her opinion, justify the required change.

Article 64 - The Registrar must then, within 30 days, render a written and reasoned decision.

Article 65 - In the event that the person concerned wishes to contest the Registrar's decision, an appeal may be filed with the Band Council within 60 days of the decision rendered. This appeal shall be made by written request setting out the reasons why the person concerned is dissatisfied with the Registrar's decision.

Article 66 - The Band Council then acts as an appeal tribunal and has the authority to review the decision rendered by the Registrar.

[39] According to the Landrys, this implies that only a member or a person claiming to be a member has standing to contest an entry on the Band membership list.

[40] In my opinion, however, the corrections and amendments to the membership list requested by the Council fall more within the general obligation imposed on the Registrar by the Membership Code to maintain a Register containing the six chapters described in paragraph 16 of these reasons (article 37) and to keep the membership list up-to-date (article 49).

[41] To the extent that the Registrar does not respect the mandate for which he or she is elected and refuses to comply with the Membership Code, it seems logical to me that the Council could take the necessary steps to remedy the situation.

[42] I am therefore of the view that the Council has a legal interest in challenging the Band membership list and the manner in which the Register is maintained.

B. *Is article 26 of the Membership Code, which provides that associate members are not entitled to vote, discriminatory and illegal?*

[43] The Landrys argue that by adopting its Electoral Code in 2008 and accepting that associate members vote in Band Council elections, the Band consciously and voluntarily complied with the principles developed in the *Corbiere* decision.

(1) The *Corbiere* decision

[44] In *Corbiere*, the Supreme Court confirmed and applied the test developed a few months earlier in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1, to determine whether there was discrimination within the meaning of section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, namely:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[45] The fundamental question in *Corbiere* was whether “Aboriginality-residence” constituted a ground analogous to those enumerated in section 15 of the Charter, to which the majority of the Court answered in the affirmative. In other words, the Court concluded that distinguishing between a member residing on reserve and a member residing off reserve goes to a personal characteristic essential to a band member’s personal identity.

[46] In *Corbiere*, both groups were composed of Indigenous members of the same band, whereas in the present case, the first group is composed of Indigenous people and the second group is composed of non-Indigenous people to whom the Band has decided to grant a certain status and certain well-defined rights in its Membership Code. This is a fundamental distinction, even though being a non-Indigenous person is certainly a ground enumerated in section 15 or a ground analogous to it.

[47] Basically, the Band was not required to grant any status or entitlement to associate members since they are not persons who are registered as Indians or entitled to be registered as such under the Act. The fact that they are not entitled to vote in Band Council elections therefore

does not deprive them of any benefits to which they would otherwise be entitled. In adopting its Membership Code, it was open to the Band to allow certain non-Indigenous people to participate in the cultural life of the Band while keeping the Band's destiny in the hands of ordinary members of Abénaki descent. It is perfectly legitimate for an Indigenous band to take the necessary steps to preserve its identity and culture, and to protect itself against a takeover of its destiny and its assimilation by a majority of non-Indigenous members (*Jaime Grismer v Squamish First Nation*, 2006 FC 1088 at paras 61–62).

[48] Moreover, if we extrapolate the Landrys' reasoning, we would have to conclude that the Act itself discriminates against non-Indigenous people, which is obviously untenable.

[49] I therefore conclude that articles 18 and 26 of the Band Membership Code are valid and that they do not constitute discrimination against associate members within the meaning of section 15 of the *Charter*.

(2) The 2008 Electoral Code and custom

[50] The Landrys argue that the Electoral Code adopted in 2008 confirms the practice established since 1987 to the effect that all Band members without distinction have the right to vote in Band Council elections.

[51] In my view, the starting point for the analysis of this issue lies in section 10 of the Act, which provides that:

10 (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

(2) A band may, pursuant to the consent of a majority of the electors of the band:

(a) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and

(b) provide for a mechanism for reviewing decisions on membership.

...

(10) A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.

[52] The Membership Code adopted by the Band in 1987 was widely supported as it was adopted by the majority of its constituents. The majority of voters therefore decided to create a membership class composed of non-Indigenous people, but to limit the rights and privileges granted to them. It decided that these associate members would not be entitled to vote in elections and that although their names appeared on the membership list, they should be excluded from the electoral list.

[53] The evidence shows, however, that despite this support, no Registrar was elected in accordance with the procedure set out in the Membership Code (prior to the election of respondent Lynda Landry) and that neither the Band membership list nor the Register was rigorously maintained, in that they were not kept up-to-date and did not identify members by

class. As a result, some associate members have actually voted in Band Council elections in the past. The Landrys submitted affidavits from a dozen associate Band members attesting to their status and stating that they had voted in elections for many years.

[54] The evidence does not, however, allow me to know exactly how many associate members there are in the Band, whether all associate members regularly voted in elections and, more importantly, whether this practice was known and accepted by all ordinary members, or even a majority of them.

[55] It is for the person invoking custom as a source of law to prove this. Here is what Professor Ghislain Otis, “Élection, gouvernance traditionnelle et droits fondamentaux chez les peuples autochtones du Canada” [Election, Traditional Governance and Fundamental Rights among the Aboriginal Peoples of Canada] (2004), 49: 2 RD McGill 393 at pp 402–403, No. 36, has to say on the subject of Indigenous customs as a source of law:

[TRANSLATION]

In respect of customs, judges have confirmed the validity of any standard adopted based on “practices [that] are generally acceptable to members of the band, upon which there is a broad consensus.”

...

Some longstanding and consistent practices that are generally accepted by the community may, however, not meet the standard set out in the code. In such cases, the courts have held that the customary norm in force is that dictated by what is done rather than what is written.

...

Custom can be established by unwritten election practices followed consistently in prior elections without complaint from band members.

[56] To the extent that it is established that it was never possible for the Electoral Officer to identify associate members and thereby exclude them from the electoral process, and to the extent that it is impossible to know whether this was a practice generally known and accepted by Band members (many if not the majority of whom remain off reserve), one cannot logically speak of a custom that superseded the clear language of the Membership Code that was clearly adhered to by all members.

[57] The failure to comply with the Membership Code with respect to the election of a Registrar and the maintenance of an up-to-date Register and membership list also does not make for a custom.

[58] I am also of the opinion that the subsequent adoption of the Electoral Code did not have the effect of amending the Membership Code. Nor is it incompatible with the latter if the list provided by the Registrar contains only the names of ordinary members of the Band, as provided for in the Membership Code.

[59] The Membership Code provides that it may only be amended by a Band Council resolution passed by a majority vote of all Band members and that it takes precedence over any other regulatory provision.

[60] I am therefore of the opinion that neither the Electoral Code nor any custom takes precedence over the Membership Code duly adopted by a majority of Band members and that, consequently, associate members do not have the right to vote in Band Council elections.

[61] I am also of the view that prior to the next election for chief and councillors, the Registrar must provide the Electoral Officer with an updated list of Band members entitled to vote, which excludes or identifies associate members. In my opinion, and in order to hold the next election as soon as possible, I do not believe that it is necessary for the Register to be completed in accordance with all the chapters listed in paragraph 16 of these reasons prior to the holding of this election.

[62] Since the respondent Linda Landry has not taken a position on the substantive issue, no costs will be awarded against her.

V. Conclusion

[63] For the reasons set out herein, the application for judicial review in T-1139-19 is dismissed with costs, while the application for judicial review in T-1227-19 is allowed without costs.

JUDGMENT in T-1139-19 and T-1227-19

THIS COURT’S JUDGMENT is as follows:

1. The application for judicial review in T-1139-19 is dismissed and the Court declares that the associate members of the Abénakis of Wôlinak Band are not entitled to vote in the election for chief and councillors of the Abénakis of Wôlinak Band;
2. Costs in T-1139-19 are awarded to the respondents the Council of the Abénakis of Wôlinak, Michel R. Bernard, René Milette and Lucien Milette;
3. The application for judicial review in T-1227-19 is allowed in part;
4. The Court orders Registrar Lynda Landry to provide the Electoral Officer with an updated list of the members of the First Nation of the Abénakis of Wôlinak, which identifies or excludes associate members of the Band;
5. No costs are awarded in T-1227-19;

“Jocelyne Gagné”
Associate Chief Justice

Certified true translation

Johanna Kratz

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: T-1139-19 AND T-1227-19

DOCKET: T-1139-19

STYLE OF CAUSE: STÉPHANE LANDRY, DENIS LANDRY, HUGO LANDRY, MAXIME LANDRY, SHANONNE LANDRY, NORMAND CORRIVEAU, NORMAND BERNARD CORRIVEAU, NICOLAS ALEXIS LELAIDIER and RÉAL GROLEAU v THE COUNCIL OF THE ABÉNAKIS OF WÔLINAK, MICHEL R. BERNARD, RENÉ MILETTE and LUCIEN MILETTE

AND DOCKET: T-1227-19

STYLE OF CAUSE: THE COUNCIL OF THE ABÉNAKIS OF WÔLINAK v THE REGISTRAR OF THE ABÉNAKIS OF WÔLINAK FIRST NATION

**BY VIDEO-CONFERENCE BETWEEN MONTRÉAL, QUEBEC, AND OTTAWA,
ONTARIO**

DATE OF HEARING: JUNE 18, 2020

JUDGMENT AND REASONS: GAGNÉ A.C.J.

DATED: OCTOBER 1, 2020

APPEARANCES:

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